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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 95-116, *Ex Parte* of AT&T Wireless Services, Inc.

Dear Ms. Dortch:

AT&T Wireless Services, Inc. ("AT&T Wireless") submits this *ex parte* letter in order to address a critical issue regarding Commission action on outstanding issues related to the implementation of local number portability ("LNP") between wireline and wireless carriers. In two separate petitions, the Cellular Telecommunications and Internet Association ("CTIA") has requested that the Commission resolve a number of outstanding LNP implementation matters.¹ Although the Commission has addressed a number of issues related to wireless-to-wireless LNP in a recent order,² it has not yet resolved important wireline-to-wireless issues. Certain wireline carriers have suggested that the Commission would be required to conduct an additional notice and comment rulemaking in order to resolve these wireline-to-wireless issues.³

AT&T Wireless respectfully submits that the Commission may resolve these outstanding issues by Commission order, without conducting a further rulemaking, and fully comply with the Administrative Procedure Act.⁴ Indeed, it is critical that the Commission resolve these matters expeditiously by order prior to the November 24, 2003 wireless LNP implementation deadline. In numerous pleadings in this docket, wireline carriers have taken positions that clearly disclose an intent to delay or restrict wireline-to-wireless porting absent further guidance from the Commission. The Commission must

¹ CTIA Petition for Declaratory Ruling on Local Number Portability Issues at 6, CC Dkt. 95-116 (filed May 13, 2003); CTIA Petition for Declaratory Ruling, CC Dkt. 95-116 (filed January 23, 2003).

² See *In re Telephone Number Portability*, Memorandum Opinion and Order, CC Dkt. 95-116, FCC 03-237 (rel. October 7, 2003) ("*Wireless-to-Wireless LNP Order*").

³ See, e.g., Reply Comments of BellSouth on January 23, 2003 CTIA petition (March 13, 2003).

⁴ 5 U.S.C. §§ 500-596 ("APA").

act promptly in order to prevent wireline carriers from thwarting intermodal competition in a post-wireless LNP environment.

As an initial matter, AT&T Wireless notes that parties have received more than sufficient notice that these issues are before the Commission and have had numerous opportunities for comment. CTIA filed the petitions a number of months ago and the Commission placed both petitions on public notice. Parties filed extensive comments and reply comments on both petitions. Thus, parties already have received all of the procedural “notice and comment” protections the APA requires. Moreover, under the terms of the APA, a formal notice and comment rulemaking is not required for resolution of the outstanding issues presented in the CITA petitions.

The APA only requires an agency to conduct a notice and comment rulemaking when it seeks to promulgate a “substantive” rule. A substantive rule imposes new obligations on or grants new rights to parties. The APA does not require an agency to conduct a formal rulemaking when it promulgates an “interpretive” rule.⁵ An interpretive rule clarifies or refines rights and obligations already set forth in a statute or the agency’s existing rules. Such provisions “only explain what the more general terms of the [statute] and regulations already provide” and do not “effect a change in existing law or policy.”⁶

Here, the major outstanding issues in the CTIA petitions are outgrowths of the Local Exchange Carrier (“LEC”) porting obligation set forth in 47 U.S.C. § 251(b) and the Commission’s prior LNP orders.⁷ As such, these issues are the proper subject of interpretive provisions issued by the Commission without an additional notice and comment rulemaking. Indeed, resolution of these issues in such a manner would be consistent with the Commission’s recent disposition of analogous wireless-to-wireless LNP issues in the context of the same CTIA petitions without a formal rulemaking.⁸ There are four critical issues regarding wireline-to-wireless LNP that remain unresolved: (1) the “rate center” issue; (2) the interconnection versus service agreement issue; (3) the porting interval; and (4) the methods and procedures to which carriers must adhere in the porting process.⁹ Each of these issues relates to the details regarding how carriers will

⁵ 47 U.S.C. § 553(b)(3)(A).

⁶ *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1982); *see also Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (a substantive rule does not become an interpretive rule “merely because it supplies crisper and more detailed lines than the authority being interpreted”).

⁷ *See, e.g., Telephone Number Portability*, First Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8431 (rel. July 2, 1996) (holding that both wireline and wireless carriers are obligated to provide LNP).

⁸ *See Wireless-to-Wireless LNP Order*.

⁹ In a July 3, 2003 letter ruling, the Chief of the Wireless Telecommunications Bureau clarified issues regarding the provision of enhanced 911 during the period of “mixed service” that occurs during the porting process. DA 03-2190. The Commission affirmed the Bureau Chief’s ruling, *see Wireless-to-Wireless LNP Order*, which was not limited to wireless-to-wireless porting. As a result, it does not appear that further Commission action on this issue is required.

coordinate the porting of numbers and do not reach the threshold issue of the porting obligation itself.

The “rate center” issue arises because LECs have narrowly construed their porting obligation with regard to wireless carriers by taking the position that portability is only required where wireless carriers already have a presence in the landline rate center. The Commission may issue an interpretive order clarifying that such a narrow construction of the existing duty under the statute and Commission orders is impermissible. This is the same approach the Commission recently followed in the *Wireless-to-Wireless LNP Order* in which it ruled that wireless-to-wireless LNP is not limited to those instances where the requesting carrier has numbering resources or a direct interconnection in the rate center of the number to be ported.¹⁰

Similarly, LECs have resisted service level agreements designed to facilitate intermodal porting. Instead, these carriers have sought to require carriers to engage in protracted negotiation of interconnection agreements which would delay wireline-to-wireless LNP. It is well within APA requirements for the Commission to clarify through an interpretive ruling that the LNP obligations set forth in Section 251(b) and Commission orders preclude such inappropriate requirements and that wireline carriers must port without an interconnection agreement. Again, the Commission recently issued such an interpretive ruling clarifying that interconnection agreements are not required for wireless-to-wireless LNP.¹¹

The ability of the Commission to establish an intermodal porting interval shorter than that currently in place for wireline-to-wireline porting, without further notice and comment, is less clear. However, it is well within the Commission’s authority to clarify that it would view an intermodal interval *greater* than the current wireline interval as presumptively unreasonable under 47 U.S.C. § 201. Such action would constitute interpretive guidance regarding established wireline and wireless LNP obligations rather than a new substantive rule and would be entirely consistent with the Commission’s *Wireless-to-Wireless LNP Order*. The Commission could follow the same approach on the issue of the methods and procedures carriers must follow for intermodal porting.¹²

Even if construed as involving more substantive issues, it would be proper for the Commission to resolve these matters through an individual order on the CTIA petitions for declaratory ruling rather than through the promulgation of general rules. An agency

¹⁰ *Wireless-to-Wireless LNP Order* at ¶ 21. AT&T Wireless recognizes that the Commission excluded wireline-to-wireless LNP from this holding. AT&T Wireless cites to this holding to demonstrate that the Commission may use the same procedural vehicle, *i.e.* an interpretive ruling rather than a rulemaking, to resolve the analogous wireline-to-wireless issue.

¹¹ *See Wireless-to-Wireless LNP Order* at ¶ 21.

¹² Although AT&T Wireless urges the Commission to follow the approach established for the approval of wireline LNP process flows developed under the auspices of the North American Numbering Council (“NANC”), *see* 47 C.F.R. § 52.26, in the interim the Commission could offer guidance to carriers as to what conduct the Commission would deem reasonable in this area.

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has a great deal of discretion in deciding whether to announce new principles in the context of an adjudicatory proceeding (such as a declaratory ruling) or to act through a formal rulemaking. Proceeding *via* an adjudicative proceeding is particularly appropriate where interested parties have had opportunities to present their views on the issues to the agency.¹³ Here, parties have received detailed notice of the issues and filed extensive comments and reply comments on them.

AT&T Wireless urges the Commission to move expeditiously in resolving the outstanding LNP issues presented in the CTIA petitions and to do so without initiating a time-consuming and unnecessary rulemaking proceeding. AT&T Wireless respectfully submits that the Commission must resolve these issues immediately if carriers are to meet the November 24, 2003 deadline for implementation of wireless LNP.

Thank you for your consideration of this matter.

Sincerely,

/s/

Douglas I. Brandon

Vice President – Legal and External Affairs

AT&T Wireless Services, Inc.

cc: Bryan Tramont, Chief of Staff
John Muleta, Bureau Chief, Wireless Telecommunications Bureau
William Maher, Bureau Chief, Wireline Competition Bureau

¹³ See *Chisolm v. FCC*, 538 F.2d 349, 365-66 (D.C. Cir. 1976).